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8 UNITED STATES DISTRICT COURT

9 SOUTHERN DISTRICT OF CALIFORNIA

10 UNITED STATES OF AMERICA,)	Criminal Case No. 08CR1454-JAH
)	
11 Plaintiff,	)	DATE: June 2, 2008
	)	TIME: 8:30 a.m.
12 v.)	
	)	GOVERNMENT'S RESPONSE IN
13 MOISES VALVERDE-GARCIA,	)	OPPOSITION TO DEFENDANT'S
	)	MOTIONS TO:
14 Defendant.)	
	)	1) COMPEL DISCOVERY; AND,
15	)	2) LEAVE TO FILE FURTHER
	)	MOTIONS
16)	
	)	TOGETHER WITH STATEMENT OF FACTS
17	)	AND MEMORANDUM OF POINTS AND
	)	AUTHORITIES
18)	

19 COMES NOW the plaintiff, UNITED STATES OF AMERICA, by and through
20 its counsel, Karen P. Hewitt, United States Attorney, and Christopher
21 P. Tenorio, Assistant United States Attorney, and hereby files its
22 response in opposition to Defendant's above-titled motions. Said
23 response is based upon the files and records of the case, together
24 with the attached Statement of Facts and Memorandum of Points and
25 Authorities.

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I.

STATEMENT OF FACTSA. PRESENT OFFENSE

On April 25, 2008, at approximately 1:15 p.m., Border Patrol Agent Erick Cortez responded to a seismic sensor activation near Otay Mesa, California, located approximately eight miles north of the United States/Mexico International boundary and approximately 12 miles east of the Otay Mesa Port of Entry. At approximately 1:20 p.m., Agent Cortez arrived and followed footprints northbound until he encountered five individuals attempting to hide within brush, including Defendant Moises Valverde-Garcia. Agent Cortez identified himself as a Border Patrol agent to the individuals in both English and Spanish. Pursuant to an immigration inspection, all of the individuals, including Defendant, stated that they were Mexican citizens with no immigration documents to permit them to be or remain in the United States. At approximately 1:30 p.m., Agent Henderson arrested Defendant and the others, who were subsequently transported to the Brown Field Border Patrol Station.

At approximately 4:42 p.m. a.m., Senior Patrol Agent Salvador Vasquez advised Defendant of his Miranda rights in Spanish. Agent Heather Teeple witnessed the advisal. Defendant invoked his right to remain silent. No further questions were asked.

At approximately 6:45 p.m., Border Patrol Agent Dich Coles learned that Defendant was not under the influence of any drugs. He advised Defendant of his right to speak with a representative of the Mexican Consulate. Defendant declined to exercise his right.

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1 Defendant was subsequently indicted on May 7, 2008 for Deported
2 Alien Found in the United States, in violation of Title 8, United
3 States Code, Section 1326(a) and (b).

4 **B. PRIOR HISTORY**

5 **1. Criminal History**

6 Defendant's prior criminal convictions include the following:

- 7 • Deported Alien Found in the U.S., in violation of 8 U.S.C.
8 § 1326, on December 19, 2005;
- 9 • Illegal Entry (misdemeanor), in violation of 8 U.S.C. §
10 1325, and False Statement to a Federal Officer, in
11 violation of 18 U.S.C. § 1001, on September 18, 2003;
- 12 • False Statement to a Federal Officer, in violation of 18
13 U.S.C. § 1001, on April 11, 2001;
- 14 • Deported Alien Found in the U.S., in violation of 8 U.S.C.
15 § 1326, on July 10, 2000; and,
- 16 • Deported Alien Found in the U.S., in violation of 8 U.S.C.
17 § 1326, on March 24, 1999.

18 **2. Immigration History**

19 Immigration Judge Ignacio Fernandez ordered Defendant's
20 deportation on August 13, 1997. Defendant was recently deported on
21 November 24, 2006 through the San Ysidro Port of Entry.

22 **II.**

23 **THE GOVERNMENT WILL PROVIDE DISCOVERY AS PROVIDED HEREIN**

24 Except as described below, the Court should deny Defendant's
25 discovery requests.

26 **1. Rule 16(a)(1)(A) : Defendant's Statements**

27 The Government has disclosed all known written and statements of
28 the Defendant and the substance of oral statements made by the

1 Defendant in response to questions by government agents in this case.

2 **2. Documents, Arrest Reports, and Tangible Evidence**

3 In accordance with obligations under Rule 16(a)(1)(C) and 16(c),
4 the Government will permit the Defendant to inspect and copy or
5 photograph all books, papers, documents, photographs, tangible
6 objects, buildings, or places, or portions thereof, which are within
7 or may come within the possession, custody, or control of the
8 Government, and which are material to the preparation of the
9 Defendant's defense or are intended for use by the Government as
10 evidence-in-chief at trial or were obtained from or belong to the
11 Defendant.

12 **3. Rule 16, and Brady: For Exculpatory Evidence**

13 The Government is well aware of, and will fully perform, its duty
14 under, Brady v. Maryland, 373 U.S. 83 (1963), and United States v.
15 Agurs, 427 U.S. 97 (1976). Accordingly, the Government will disclose
16 exculpatory evidence within its possession that is material to the
17 issue of guilt. Defendant is not entitled to all evidence known or
18 believed to exist which is, or may be, favorable to the accused, or
19 which pertains to the credibility of the Government's case. As the
20 Ninth Circuit Court of Appeals stated in United States v. Gardner, 611
21 F.2d 770 (9th Cir. 1980):

22 [T]he prosecution does not have a constitutional duty to
23 disclose every bit of information that might affect the
24 jury's decision; it need only disclose information
favorable to the defense that meets the appropriate
standard of materiality.

25 Id. at 774-75 (citations omitted). See also United States v.
26 Sukumolachan, 610 F.2d 685, 687 (9th Cir. 1980) (the Government is not
27 required to create non-existent exculpatory material); United States
28 v. Flores, 540 F.2d 432, 438 (9th Cir. 1976) (Brady does not create

1 any pretrial discovery privileges not contained in the Federal Rules
2 of Criminal Procedure).

3 **4. Rule 16, and Brady: For Sentencing**

4 The Government is also well aware of, and will fully perform, its
5 duty under Brady v. Maryland, 373 U.S. 83 (1963) and United States v.
6 Agurs, 427 U.S. 97 (1976) regarding evidence pertaining to punishment.
7 Accordingly, and consistent with its position stated above, the
8 Government will disclose exculpatory evidence within its possession
9 that is material to the issue of punishment.

10 **5. Rule 16(a)(1)(A), (B), and (C): Prior Record**

11 The Government has already provided Defendant with arrest
12 reports, judgment and conviction documents for prior offenses and
13 other evidence of prior bad acts pursuant to Rules 16(a)(1)(A), (B)
14 and (C).

15 **6. Rule 16(a)(1)(C) and Fed. R. Evid. 404(b): Prior**
16 **Arrests, Convictions Or Bad Acts**

17 The Government reserves the right to introduce such prior bad
18 acts, and will address such evidence and its intentions in motions in
19 limine to be filed separately according to the Court's scheduling
20 orders.

21 **7. Rule 16(a)(1)(C): Evidence Seized**

22 In accordance with obligations under Rule 16(a)(1)(C) and 16(c),
23 the Government will permit the Defendant to inspect and copy or
24 photograph all books, papers, documents, photographs, tangible
25 objects, buildings, or places, or portions thereof, which are within
26 or may come within the possession, custody, or control of the
27 Government, and which are material to the preparation of the
28 Defendant's defense or are intended for use by the Government as

1 evidence-in-chief at trial or were obtained from or belong to the
2 Defendant.

3 **8. Henthorn Material**

4 Pursuant to United States v. Henthorn, 831 F.2d 29, 30 (9th Cir.
5 1991), the Government will comply with its responsibilities to review
6 the personnel files of its agents who may serve as witnesses; and the
7 Government will disclose any impeachment information regarding
8 criminal investigations. The Government is presently unaware of any
9 criminal involvement by any prospective government witness, or that
10 any prospective government witness is under investigation. The
11 Government objects to Defendant's request that the Assistant United
12 States Attorney personally review all personnel files of prospective
13 witnesses.

14 **9. Expert Witnesses**

15 The Government will meet obligations pursuant to Fed. R. Crim.
16 P. 16(a)(1)(E) to disclose information regarding expert witnesses.
17 The Government anticipates presenting testimony of a fingerprint
18 examination expert witness who will identify Defendant's fingerprints
19 on documents from his A-file. The Government will produce details
20 regarding the nature of the expert's testimony, and the qualifications
21 of the expert when a trial date is scheduled and any expert is
22 obtained.

23 **10. Impeachment Evidence**

24 The Government is unaware of any impeachment evidence of a
25 prospective government witness is biased or prejudiced against
26 Defendant. The Government is aware of, and will comply with, its
27 obligations regarding impeachment evidence pursuant to Brady v.
28 Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97

(1976) .

11. Evidence of Criminal Investigations of Witnesses

The Government is currently unaware of any pending criminal investigations against a prospective government witness is biased or prejudiced against Defendant. The Government will comply with its obligations under Brady v. Maryland, 373 U.S. 83 (1963) and provide such evidence if and when it becomes known.

12. Evidence of Bias, Motive to Lie of Government Witnesses

The Government is unaware of any evidence indicating that a prospective government witness is biased or prejudiced against Defendant. The Government is also unaware of any evidence that prospective witnesses have a motive to falsify or distort testimony. The Government is aware of, and will comply with, its obligations to provide such evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963), and United States v. Agurs, 427 U.S. 97 (1976).

13. Evidence of Criminal Investigation of Witnesses

The Government is unaware of any evidence indicating that a prospective government witness is currently under criminal investigation by the Government.

14. Evidence Affecting Perception, Recollection, Ability to Communicate, or Veracity

As addressed in items 12-14 above, the Government is unaware of any evidence affecting the perception, recollection, ability to communicate, or veracity of any prospective Government witness. The Government will provide such evidence pursuant to Brady v. Maryland, 373 U.S. 83 (1963), if and when it comes to light.

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1 **15. The Government Is Unaware of Favorable Defense**
2 **Witnesses**

3 The Government is unaware of any witness who made a favorable
4 statement concerning the Defendant, or of any statement that may be
5 favorable to Defendant's defense, which have not already been provided
6 in discovery.

7 **16. Jencks Act**

8 Consistent with the Jencks Act, 18 U.S.C. § 3500, the Defendant
9 is not entitled to disclosure of witness statements prior to the
10 witness testifying on direct examination at trial. The Government
11 must produce these statements only after the witness testifies on
12 direct examination. United States v. Taylor, 802 F.2d 1108, 1118 (9th
13 Cir. 1986); United States v. Mills, 641 F.2d 785, 790 (9th Cir.).
14 Indeed, even material believed to be exculpatory and, therefore,
15 subject to disclosure under the Brady doctrine, if contained in a
16 witness statement subject to the Jencks Act, need not be revealed
17 until such time as the witness statement is disclosed under the Act.
18 See United States v. Bernard, 623 F.2d 551, 556 (9th Cir. 1979).

19 The Government reserves the right to withhold the statements of
20 any particular witnesses until after they testify. However,
21 notwithstanding any statements the Government deems necessary to
22 withhold, the Government will disclose witness statements prior to
23 trial in as timely a manner as practicable, provided defense counsel
24 has complied with his obligations under Rules 12.1, 12.2, 16 and 26.2
25 of the Federal Rules of Criminal Procedure, and provided that defense
26 counsel submitted all reciprocal discovery and "reverse Jencks"
27 statements.

28 The Government will comply with its Rule 26.2 obligation to

1 produce for the Defendant's examination statements of witnesses in the
2 Government's possession after, or shortly before, such witnesses
3 testify on direct examination. The Government objects to the
4 Defendant's request that such statements be produced at this time.
5 Similarly, if Rule 12(i) becomes relevant pursuant to suppression
6 proceedings, the Government will comply with obligations to produce
7 statements in accordance with Rule 26.1.

8 **17. The Government Will Comply With Giglio**

9 The Government has not made any promises, express or implied, to
10 any government witnesses in exchange for their testimony in this case.
11 Therefore, the Government is currently unaware of any discoverable
12 impeachment information pursuant to Giglio v. United States, 405 U.S.
13 150 (1972).

14 **18. Agreements Between the Government and Witnesses**

15 Consistent with its obligations pursuant to Giglio, stated above,
16 the Government will provide any agreements with witnesses. To date,
17 however, none exist.

18 **19. Informants and Cooperating Witnesses**

19 Consistent with its acknowledged obligation to provide discovery
20 of prospective witnesses' statements, the Government would provide the
21 requested evidence. To date, however, the Government has not employed
22 any informants or cooperating witnesses in the present case.

23 **III**

24 **THE GOVERNMENT DOES NOT OPPOSE DEFENDANT'S MOTION FOR**
25 **LEAVE TO FILE FURTHER MOTIONS**

26 Although the Government does not oppose in principle Defendant's
27 request to file further motions, the Government would oppose the
28 filing of any further substantive motions that would not be

1 entertained by the court until the time set aside for motions in
2 limine. If the defendant foresees the need to file further
3 substantive motions, the Government respectfully requests that the
4 defendant request, and the Court set, a separate date for an
5 additional motion hearing, and that any motions in limine and trial
6 not be set until the conclusion of such hearing.

7 **IV**

8 **CONCLUSION**

9 Based on the foregoing, the Court should deny Defendant's above-
10 titled motions except where otherwise noted.

11 DATED: May 27, 2008

12 Respectfully submitted,

13 KAREN P. HEWITT
14 United States Attorney

15 *s/ Christopher P. Tenorio*
16 CHRISTOPHER P. TENORIO
17 Assistant U.S. Attorney
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,) Criminal Case No. 08CR1454-JAH
)
Plaintiff,) **CERTIFICATE OF SERVICE**
)
v.)
)
MOISES VALVERDE-GARCIA,)
)
Defendant.)
_____)

IT IS HEREBY CERTIFIED that:

I, CHRISTOPHER P. TENORIO, am a citizen of the United States and am at least eighteen years of age. My business address is 880 Front Street, Room 6293, San Diego, California 92101-8893.

I am not a party to the above-entitled action. I have caused service of **GOVERNMENT'S RESPONSE IN OPPOSITION TO DEFENDANT'S MOTIONS** on the following party by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them:

Michelle Betancourt, Esq.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on May 27, 2008

Respectfully submitted,

KAREN P. HEWITT
United States Attorney

s/ Christopher P. Tenorio
CHRISTOPHER P. TENORIO
Assistant U.S. Attorney